STATE OF MICHIGAN
IN THE SUPREME COURT

On appeal from the Court of Appeals,
(Cavanagh, P.J., Owens and M.J. Kelley, JJ.)

JEFFREY CULLUM,

Plaintiff-Appellee

-v-

Supreme Court No 149955
Court of Appeals No. 313739
LC No. 10-007013-NH
(Wayne County Circuit Court)

FREDERICK LOPATIN, D.O.,

Defendant-Appellant

and

DEARBORN EAR, NOSE AND THROAT CLINIC, P.C.,

Defendant

_____/

AMICUS CURIAE BRIEF OF THE MICHIGAN ASSOCIATION FOR JUSTICE

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STATEMENT OF ISSUES PRESENTED

I. Whether the trial court was required to consider all of the factors outlined in MCL 600.2955(1) in light of *Edry v Adelman*, 486 Mich 634; 786 NW2d 567 (2010)?

Amicus MAJ answers "Yes, if the court is evaluating whether an expert's opinions are the 'product of reliable methods and principles'."

II. Whether the trial court abused its discretion in holding that plaintiff's expert's opinion was inadmissible under MRE 702 because it was based on speculation?

Amicus MAJ answers "Yes, because the trial court did not consider reliability indices set forth in MCL 600.2955, ignored facts/evidence favorable to plaintiff, made impermissible credibility determinations, and favored the testimony of defendant's experts over plaintiff's expert."

III. Whether the Court of Appeals applied the correct standard of review?

Amicus MAJ answers "Yes."

INTEREST OF AMICUS CURIAE

The Michigan Association for Justice (MAJ) is an organization of Michigan lawyers engaged primarily in litigation and trial work. The Michigan Association for Justice recognizes an obligation to assist this Court on important issues of law that would substantially affect the orderly administration of justice in the trial courts of this state. This case presents a novel interpretation on issues of law, and the Court's decision could have far-reaching consequences that affect all jury trials.

STATEMENT OF FACTS

Plaintiff filed a medical malpractice case against Defendant Frederick Lopatin, D.O., an otolaryngologist, after plaintiff developed avascular necrosis (AVN) of his right hip allegedly following defendant's treatment of sinusitis with a series of corticosteroid methylprednisolone. In support of his claim, Plaintiff offered the expert testimony of Dr. Michael McKee, an orthopedic surgeon, who opined that defendant's prescription of the steroid was a probable cause of Plaintiff's AVN, or materially aggravated and/or precipitated the presence of that condition.

In December 2011, Defendant filed a motion for summary disposition challenging the threshold admissibility of Dr. McKee's testimony pursuant to MRE 702 and MCL 600.2955. Defendant argued that Dr. McKee's expert causation opinion was not a product of reliable methods of principles, and should be precluded. Plaintiff answered the motion, citing a published study on the subject authored by Dr. McKee, as well as other literature and analysis to support Dr. McKee's conclusions under MCL 600.2955 and MRE 702. The trial court denied defendant's motion to preclude Dr. McKee's testimony as unreliable.

In May 2012, Defendant Lopatin, on the eve of trial, again filed a motion for summary disposition pursuant to MCR 2.116(C)(10), this time arguing that Dr. McKee's causation opinion does not, as a matter of law, establish that the use of corticosteroid methylprednisolone is a foreseeable cause of AVN. Defendant's motion did not raise issues regarding the threshold admissibility of Dr. McKee's opinion and did not cite MRE 702 or MCL 600.2955.

However, the trial court *sua sponte* decided to revisit the issue of whether Dr. McKee's opinions pass threshold admissibility standards under MRE 702 and §2955 (without giving the parties an opportunity to supplement briefing or, apparently, without

reference to the 2011 submissions by the parties regarding the issue), and this time held that Dr. McKee's testimony was not the product of reliable methods or principles and should be precluded. As a result, the trial court granted Defendant's motion for summary disposition.

Plaintiff appealed the trial court's order. The Court of Appeals reversed the trial court. In doing so, the court held that the trial court, in keeping with its gatekeeper role, was justified in revisiting the threshold admissibility issue. However, the Court held that the trial court abused its discretion by improperly focusing only on one of the seven factors set forth under MCL 600.2955, and by improperly weighing the relative value and credibility of expert testimony provided by the parties. The Court also held that Dr. McKee's causation opinion was not speculative. See *Cullum v Lopatin*, unpublished opinion of the Court of Appeals, issued July 10, 2014 (Docket No. 313739).

Defendant-Appellant filed an application for leave to appeal to this Court. This Honorable Court has directed the clerk to schedule oral argument to consider whether to grant Defendant-Appellant's application for leave to appeal or take other action. In its order, the Court asked parties to address "whether (1) the trial court was required to consider all of the factors outlined in MCL 600.2955(1) in light of *Edry v Adelman*, 486 Mich 634; 786 NW2d 567 (2010); (2) the trial court abused its discretion in holding that plaintiff's expert's opinion was inadmissible under MRE 702 because it was based on speculation; and (3) the Court of Appeals applied the correct standard of review." *Cullum v Lopatin*, 497 Mich 1016; 862 NW2d 228 (2015).

Amicus Curiae Michigan Association for Justice (MAJ) offers the following analysis regarding these issues.

ARGUMENT

I. If A Court Considers Whether an Expert's Conclusion is the "Product of Reliable Principles and Methods" Under MRE 702 (1 of 3 listed Criteria), Then the Court Has to Consider the Statutory Factors under MCL 600.2955, Which Specifically Inform the Inquiry

The first question posed by this Court is whether a trial court is required to consider all the factors set forth in MCL 600.2955 in light of *Edry v Adelman*, 486 Mich 634; 786 NW2d 567 (2010). The answer to this question requires an analysis of the parameters for admitting expert testimony under MRE 702, MCL 600.2955 and relevant case law interpreting the two. It is the position of the MAJ that if a trial court is inquiring into whether an expert's conclusions are the "product of reliable principles and methods" (the second of three criteria set forth in MRE 702) to determine threshold admissibility, then the court has to consider the factors set forth in MCL 600.2955, which specifically inform the inquiry.

a. The Admissibility Standards of MRE 702 and MCL 600.2955, *Daubert*, and the Trial Court's Limited "Gatekeeper" Function

Both federal and state decisions caution that while the trial court must make a "searching inquiry" as to whether proffered expert testimony satisfies the standards of reliability set forth in the rules of evidence - FRE 702 or MRE 702- or by statute - see, MCL 600.2955- the court's role extends no further than examining whether there is a scientifically reliable basis for the expert's opinion, and not determining whether or not the conclusions drawn by the expert are true or credible. That decision remains a matter for the jury to resolve.

The inquiry to be undertaken by the trial court is a flexible one focusing on the principles of methodology employed and not on the conclusions reached. *Daubert v Merrell Dow Pharm., Inc,* 509 US 579, 594; 113 S Ct 2786, 2797; 125 L Ed 2d 469 (1993). The

mere fact that two experts hold different opinions or come to diverse conclusions interpreting the facts of a case is not a basis for concluding that one or the other is scientifically flawed. As long as the expert's opinion rests upon a reliable or well recognized scientific foundation, the court should admit the testimony. *Id*.

The evidentiary standard of reliability is much lower than the standard of correctness. A court should find an expert's opinion reliable if it is based on good grounds, i.e., upon the methods and procedures of science. The grounds merely have to be good, not perfect, and the court should exclude opinion evidence only when it is seriously flawed. An opinion grounded upon the facts, known scientific principles, professional experience, and the application of logic, is one that rests upon a reliable methodology and should be admitted into evidence. All other criticisms merely go to the weight, not to the admissibility, of the evidence. See *Lopez v Gen Motors Corp*, 224 Mich App 618, 632; 569 NW2d 861 (1997); *People v Stiller*, 242 Mich App 38, 55; 617 NW2d 697 (2000).

The admissibility of expert testimony is governed by MRE 702, which was amended effective January 2, 2004 to conform the rule more closely to FRE 702. It now provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The second sentence of the Staff Comment to the amended rule cites to *Daubert v Merrell Dow Pharm., Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993) and *Kumho Tire Co, Ltd v Carmichael*, 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999), and states that, “The new language requires trial judges to act as gatekeepers who must exclude

unreliable expert testimony." *People v Stanaway*, 446 Mich 643, 692-693; 521 NW2d 557 (1994).

In *Daubert,* the United States Supreme Court held that general acceptance of scientific evidence in the field to which it belongs was not a precondition to admissibility under FRE 702, thus overruling *Frye v United States*, 293 F 1013; 54 App DC 46 (DC Cir 1923).[1] Instead, *Daubert* held that FRE 702 merely requires the trial judge to ensure that an expert's testimony is relevant to the issues. Pertinent evidence based on scientifically valid principles will satisfy those demands, even if the scientific evidence is not generally accepted in the field. *Daubert* was clearly intended to "allow district courts to admit a somewhat broader range of scientific testimony than would have been admissible under *Frye*." *Gen Elec Co v Joiner*, 522 US 136, 142; 118 S Ct 512; 139 L Ed 2d 508 (1997) (emphasis added). *Daubert* defined the trial court's special role as a "gatekeeper" with regard to expert opinion testimony and evidence:

> The trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. *Daubert*, 509 US at 589.

The *Daubert* Court established the following non-exclusive, four-part test to be utilized by trial courts in determining whether the proposed expert testimony or evidence is reliable:

[1] In *People v Davis*, 343 Mich 348, 370-371; 72 NW2d 269 (1955), the Court adopted *Frye* and applied a "general scientific recognition" test in holding polygraph results inadmissible. The *Davis-Frye* test precluded admission of novel scientific evidence unless the proponent showed it had "gained general acceptance in the scientific community" to which it belonged. *Droste v City of Highland Park*, 258 Mich 1, 9; 241 NW 823 (1932); *People v Coy*, 258 Mich App 1; 669 NW2d 831 (2003). The *Davis-Frye* test was applied only to novel scientific techniques or principles. *Davis-Frye* did not apply to scientific evidence already in the relevant scientific community. *People v Haywood*, 209 Mich App 217, 221-224; 530 NW2d

> (1) Can the underlying scientific theory or technique be tested;
>
> (2) Has the theory or technique been subjected to peer review and publication;
>
> (3) Is there a known or potential rate of error for the particular scientific technique; and
>
> (4) Whether the underlying scientific technique has achieved a particular degree of acceptance within the relevant scientific community. [*Id.* at 592-594.]

When the Supreme Court revisited this issue in *Kumho Tire Co, Ltd*, supra, p 137, it relaxed the emphasis on the four factors suggested in *Daubert*, clearly noting that the above-listed factors are not exclusive, and that it is the trial court's function to examine those factors which bear upon the reliability of a particular opinion in light of the circumstances of each particular case. *Kumho*, 119 S Ct at 1175. *Daubert* and its progeny emphasized that expert witness testimony was not to be subjected to an inflexible and unattainable standard. In fact, the Supreme Court explained that scientific testimony need not be "known to a certainty" in order to be admissible. The *Daubert* Court noted:

> **Of course it would be unreasonable to conclude that the subject of scientific testimony must be "known" to a certainty. Arguably, there are no certainties in science**. [*Id.* at 590 (emphasis added).]

The *Daubert* court emphasized the important role of "inference" in expert scientific testimony and stressed that expert opinions may properly be based upon logical extensions of what is known, stating:

> **But in order to qualify as "scientific knowledge", an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation – - i.e., "good grounds", based on what is known.** In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of

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497 (1995).

evidentiary reliability. [*Id.* at 590 (emphasis added)].

The fact that the methodology was the same as that used by clinicians treating patients provides ample justification for admissibility. The Sixth Circuit Court has held that the diagnoses and prognoses of medical doctors are ordinarily admissible in evidence when based on the same information, methods and clinical experience employed in treating patients. *Best v Lowe's Home Centers, Inc*, 563 F3d 171, 178-182 (CA 6 2009); *Dickenson v Cardiac & Thoracic Surgery of E Tenn*, 388 F3d 976, 980-982 (CA 6 2004); *Heller v Shaw Indus, Inc*, 167 F3d 146 (3d Cir 1999); *Gass v Marriott Hotel Services, Inc*, 558 F3d 419, 426-427 (CA 6 2009)(applying FRE 702).

Scientifically valid "inferences" or "assertions," which have a medical and scientific basis, should not be conflated or confused with mere speculation, which lacks any scientific or medical foundation. See, e.g.**,** *Jahn v Equine Services, PSC*, 233 F3d 382 (CA 6 2000) (inferences based upon known scientific principles are admissible into evidence). In fact, trained experts commonly extrapolate from existing data, and may properly do so. See, e.g., *Gen Elec Co*, supra at 136 To extrapolate simply means "to infer from something that is known" or, more scientifically, "to estimate (the value of a variable) outside the tabulated or observed range". *Random House Websters Unabridged Electronic Dictionary* (1996). This is consistent with the *Daubert* court's finding that "drawing an inference" from valid data comports with the scientific method and should not be excluded. *Daubert*, supra at 590.

Supportive medical literature is only one criteria to be considered in evaluating the foundation of an expert's opinion, not the exclusive criteria. *Robins v Garg*, 276 Mich App 351; 741 NW2d 49 (2007), *Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597; 705 NW2d 703 (2005), *remanded in part, app den in part* 477 Mich 1067 (2007), *Heller v Shaw*

Indus, Inc, 167 F3d 146 (3d Cir 1999), *Chapin v A & L Parts, Inc*, 274 Mich App 122 ; 732 NW2d 578 (2007).

In *Clerc* the trial court had ruled an expert's testimony inadmissible solely on the basis that the expert had cited no medical literature in support of his conclusions relating to backward staging of cancer. In reversing, the Court of Appeals cautioned that the absence of medical or scientific studies specifically on point "should not necessarily operate as a complete bar" to the testimony because of ethical or reasoned constraints upon conducting such studies. It is sufficient if the basis for the expert's opinions is "generally accepted in the medical community as reliable" and the Court must also consider the experts "individual knowledge and experience" as well as general knowledge in the scientific community as bearing upon its admissibility. As the Court of Appeals noted in *People v Unger*, 278 Mich App 210, 220; 749 NW2d 272 (2008):

> "We note that Dr. Dragovic's inability to specifically identify any medical or scientific literature to support his conclusions in this case does not necessarily imply that his opinions were unreliable, inadmissible, or based on 'junk science'. Indeed, it is obvious that not every particular factual circumstance can be the subject of peer-reviewed writing."

In *Heller v Shaw Indus, Inc*, 167 F3d 146 (3d Cir 1999), the federal Court of Appeals observed that "physicians do not wait for conclusive, or even published and peer-reviewed, studies to make diagnoses to a reasonable degree of medical certainty." The Court noted that a physician's own experience with patients, discussions with peers, attendance at professional conferences and seminars, along with review of the history of the case "should suffice for the making of a differential diagnosis even in those cases in which peer-reviewed studies do not exist..." *Heller*, 167 F3d at 155-156. As recognized by the Court of Appeals in *Chapin,* 274 Mich App at 140, even when research relating to the subject matter of an

expert's opinion does exist, two experts may reasonably disagree as to its meaning and significance as it applies to the specific case at hand.

In *Gilbert*, this Court explained that the amendment of MRE 702 "explicitly" incorporated the *Daubert* standards and replaced the requirement of general recognition with a requirement of scientific reliability, "reached through reliable principles and methodology." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781-782; 685 NW2d 391 (2004). Pursuant to *Daubert*, a court must ***"exclude junk science"*** *Id.*

Additionally, MCL 600.2955(1) (which is essentially a codification of the *Daubert* factors) provides that, in a personal injury action, "a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact." To make this determination, a court must, in accordance with the statute, "examine the opinion, and the basis for the opinion, . . . and shall consider all of the following factors":

> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
>
> (b) Whether the opinion and its basis have been subject to peer review publication.
>
> (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
>
> (d) The known or potential error rate of the opinion and its basis.
>
> (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
>
> (f) Whether the basis for the opinion is reliable and

> whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
>
> (g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation. [MCL 600.2955(1)]

The statute does not require that each and every one of these seven factors favor the proffered testimony. *Chapin*, 274 Mich App at 137. Instead, like the *Daubert* factors, it is up to the trial court to determine the relevant factors and to conduct an inquiry as to threshold reliability of the proffered expert opinions.

b. The Seeming Disparity Between *Clerc* (Which Held that a Trial Court "Shall" Consider §2955 Factors When Determining Threshold Admissibility of Expert Testimony) and *Edry* (Which Held An Expert's Testimony Could Be Precluded under MRE 702 without Analysis of the §2955 Factors) Is Reconciled Given that §2955 Only Implicates 1 of 3 Criteria Set Forth in MRE 702

MRE 702 and MCL 600.2955 deal with the same subject matter: a trial court's role in evaluating threshold admissibility of expert testimony. It makes sense that, in most cases, the two should be analyzed together. This Court by order in *Clerc v Chippewa Co War Mem Hosp*, 477 Mich 1067, 1068; 729 NW2d 221 (2007), recognized that a trial court's gatekeeper role under MRE 702 is informed by the factors listed in MCL 600.2955. The Court acknowledged that the statute requires that a trial court "shall" consider the §2955 factors, making the inquiry mandatory, not permissive. In *Clerc*, the trial court, in granting defendant's motion to preclude plaintiff's expert's testimony, failed to consider the indices set forth in §2955 and instead focused solely on plaintiff's inability to present specific studies to support his opinion. This Court held that the curtailed inquiry restrained to just one of the seven §2955 factors was error. As a result, this Court remanded the case back

to the trial court to consider all the factors and "complete a proper inquiry."

Three years later, in *Edry v Adelman*, 486 Mich 634; 786 NW2d 567 (2010), the Court seemed to implicitly back away from the requirement recognized in *Clerc* that a trial court must consider all §2955 factors. In *Edry*, the plaintiff brought an action against her doctor, alleging that his failure to follow-up on a bump under her arm delayed the diagnosis and treatment of breast cancer, impacting her survival rate. This Court affirmed the trial court's decision to not allow plaintiff's oncology expert to testify that the plaintiff's chances of surviving five years would have been 95 percent if she had been diagnosed earlier and that the delay in diagnosis reduced her five-year survival chance to 20 percent. *Id*. at 636–640. The Court concluded:

> Here, [the plaintiff's expert's] testimony failed to meet the cornerstone requirements of MRE 702. Dr. Singer's opinion was not based on reliable principles or methods; his testimony was contradicted by both the defendant's oncology expert's opinion and the published literature on the subject that was admitted into evidence, which even Dr. Singer acknowledged as authoritative. **Moreover, no literature was admitted into evidence that supported Dr. Singer's testimony. Although he made general references to textbooks and journals during his deposition, plaintiff failed to produce that literature, even after the court provided plaintiff a sufficient opportunity to do so.** Plaintiff eventually provided some literature in support of Dr. Singer's opinion in her motion to set aside the trial court's order, but the material consisted only of printouts from publicly accessible websites that provided general statistics about survival rates of breast cancer patients. The fact that material is publicly available on the Internet is not, alone, an indication that it is unreliable, but these materials were not peer-reviewed and did not directly support Dr. Singer's testimony. Moreover, plaintiff never provided an affidavit explaining how Dr. Singer used the information from the websites to formulate his opinion or whether Dr. Singer ever even reviewed the articles.
>
> Plaintiff failed to provide any support for Dr. Singer's opinion that would demonstrate that it has some basis in fact, that it is the result of reliable principles or methods, or that Dr. Singer applied his methods to the facts of the case in a reliable manner, as required by MRE 702.
> [Id. at 640–641 (internal footnote omitted) (emphasis added).]

The Court, in footnote 7 of the opinion, then explained that the trial court did not need to consider the §2955 factors because plaintiff failed to meet MRE 702 criteria:

> We need not address MCL 600.2955 in this case because an expert witness who is qualified under one statute may be disqualified on other grounds. See *Woodard v. Custer*, 476 Mich. 545, 574 n. 17, 719 N.W.2d 842 (2006). Here, Dr. Singer's opinion is inadmissible under MRE 702; therefore, it is unnecessary to consider the admissibility of his opinion under MCL 600.2955.

At first blush, the Court's opinion in *Edry* seems to be contradictory to the Court's reasoning in *Clerc*. However, a closer analysis reveals this is not the case. MRE 702 sets forth three specific criteria governing threshold admissibility, each of which must be met: 1) the testimony is based on sufficient facts or data, 2) the testimony is the product of reliable principles and methods, and 3) the expert applied the principles and methods reliably to the facts of the case. Criteria 1 and 3 can be evaluated independently without reference to MCL 600.2955; number 2, however, is specifically informed by §2955, and a trial court's "searching inquiry" under this factor of MRE 702 cannot be completed without a concurrent analysis of §2955.

The seeming disparity between *Edry* and *Clerc* is reconciled with this interpretation of the interplay between MRE 702 and MCL 600.2955. The plaintiff's expert in *Edry* was precluded because the plaintiff failed to make a sufficient showing supporting admissibility under ***any*** of the three MRE 702 criteria. In *Clerc*, on the other hand, the trial court was evaluating whether plaintiff's expert's opinions were the product of reliable methods and principles: the court concluded that the opinions were not reliable based on the lack of supporting medical literature. However, the trial court failed to consider the other §2955 factors, and this Court remanded for "a proper inquiry."

Thus, whether §2955 is implicated depends on *why* the trial court disqualifies an

expert's testimony under MRE 702. If testimony is deemed unreliable because it is not based on sufficient facts or data, or because the expert applies the facts and methodology unreliably, then the expert can be disqualified under MRE 702 without reference or analysis under §2955. On the other hand, if a trial court disqualifies an expert based on a finding that the expert's testimony is the product of unreliable principles or methods, then the court "shall" consider the §2955 factors, which specifically inform the inquiry.

Amici MAJ notes that its analysis on this issue is in keeping with the analysis offered by both parties as well.

c. Defendant-Appellant Incorrectly Argues that an Evaluation of Studies and Experience Supporting Plaintiff's Expert's Opinion is Analyzed under the "Sufficient Facts and Data" Criterion of MRE 702, as Opposed to the "Product of Reliable Principles and Methods"

Up to this point, Amici MAJ's analysis of this Court's question first posed—whether the trial court was required to consider all of the factors outlined in §2955(1) in light of *Edry v Adelman*—comports with the analysis offered by both parties. However, MAJ disagrees with Defendant-Appellant's position that the trial court's inquiry in this case implicated the "sufficient facts and data" criterion of MRE 702, as opposed to the "product of reliable principles and methods." Defendant-Appellant argues that Plaintiff's expert's citation to limited peer-reviewed literature does not meet the magical number to comprise "sufficient facts and data" under MRE 702. However, this argument misapprehends this criterion of MRE 702 and results in flawed analysis.

The "sufficient facts and data" criterion of MRE 702 is not meant to evaluate the quantum of medical literature and analysis that a party/expert provides in support of the

methodology behind an expert's opinion—medical literature supporting an opinion addresses one factor regarding whether the opinion is the *product of reliable principles or methods*. Rather, the "sufficient facts and data" criterion of MRE 702 speaks to whether there is an adequate factual predicate to supply a basis for the expert's opinion. In other words, an expert is charged with forming an opinion based on the specific facts of the case, and not on mere generalizations that have no basis to the case.

MRE 703, when read in *pari materia* to MRE 702, supports this construction of the phrase "sufficient facts and data" in MRE 702. MRE 703, which addresses the bases of an expert's opinion testimony, provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter.

The language of MRE 703 makes it clear that the phrase "the facts or data" in the rule refers to facts or data in the particular case. Basically, the rule requires that an expert's opinion be based on the facts of the case, and is a tool to preclude the admission of speculative opinions based on conjecture at trial.

MRE 702 also contains a similar tool to preclude speculative expert opinions, only this time at the point of determining threshold admissibility of proffered testimony (as opposed to at trial): the rule requires that experts base opinions on "sufficient facts or data" in order to pass threshold admissibility scrutiny. Although MRE 702 does not explicitly say so, it is clear that the "sufficient facts or data" criterion of the threshold reliability inquiry relates to whether the expert has based his or her opinion on an adequate factual predicate.

Michigan courts have consistently interpreted the "sufficient facts or data" criterion of MRE 702 in this manner. For example, this Court in *Gilbert v DaimlerChrysler Corp*, 470

Mich 749; 685 NW2d 391 (2004) instructed that trial courts should not focus *solely* on whether an expert's opinions are based on sufficient facts or data under MRE 702, but should also consider an expert's qualifications and how the expert applies his expertise to the facts or data. This Court warned:

> When a court focuses its MRE 702 inquiry on the data underlying expert opinion and neglects to evaluate the extent to which an expert extrapolates from those data in a manner consistent with *Davis–Frye* (or now *Daubert*), it runs the risk of overlooking a yawning "analytical gap" between that data and the opinion expressed by an expert. As a result, ostensibly legitimate data may serve as a Trojan horse that facilitates the surreptitious advance of junk science and spurious, unreliable opinions. *Gilbert*, 470 Mich at 783 (internal footnote omitted).

The Court recognized that plaintiff's expert in *Gilbert* based his opinions on sufficient facts and data—the plaintiff's medical records, etc.—but held that there was an analytical gap between the data and the expert's opinion, rendering the opinion itself unreliable. This Court analyzed the expert's qualifications and concluded that the expert could not have reliably reached his conclusions, regardless that he based his conclusions on sufficient facts of the case. In doing so, this Court acknowledged that the "sufficient facts or data" criterion of MRE 702 is referring to the specific facts of the case, not to the quantum of literature supporting the expert's methodology.[2]

Defendant-Appellant advocates morphing the "sufficient facts or data" part of the

[2] See also *Clerc v Chippewa Co War Mem Hosp*, unpublished opinion of the Court of Appeals, issued November 14, 2013 (Docket No. 307915) ("The evidence similarly supports admissibility under the MRE 702 criteria. First, Dr. Veach's testimony is based on sufficient facts or data because it is based on Dr. Veach's personal examination of the decedent, his review of her medical records, and his knowledge and experience as a certified oncologist."); *Estate of Groulx v Bard*, unpublished opinion of the Court of Appeals, issued April 23, 2015 (Docket No. 307915) (holding an expert's opinions were not "based on sufficient facts or data" under MRE 702 because circumstances under which expert conducted experiment differed significantly from those that existed at the time of the accident).

MRE 702 inquiry into another analysis of whether the expert's opinion is a product of reliable principles or methods (the second criterion of MRE 702). In this case it is clear that Defendant seeks to do so in order to secure a favorable outcome. However, going forward—for this case and the next 100 cases—defendant's advocated analysis makes no sense. Conflating the first and second criteria of MRE 702 renders one of the two useless, and such an interpretation of the rule should be eschewed as contrary to this Court's rules of statutory construction. See *Apsey v Mem Hosp*, 477 Mich 120, 127; 730 NW2d 695, 699 (2007) ("Whenever possible, every word of a statute should be given meaning. And no word should be treated as surplusage or made nugatory.").

In sum, it is the position of the MAJ that a trial court does not need to consider MCL 600.2955 when evaluating the threshold admissibility of expert testimony under MRE 702 if the court is only evaluating whether the testimony is based on "sufficient facts and data" or whether the expert's methodology is "reliably applied to the facts of the case;" however, if the trial court conducts an inquiry into whether an expert's opinions are the "product of reliable principles and methods," then the court has to concurrently analyze the §2955 factors, which specifically inform the inquiry.

II. The Court of Appeals Correctly Determined that The Trial Court Abused its Discretion By Holding that Plaintiff's Expert's Opinions Were Based on Speculation

Issues 2 and 3 posed by the Court in its order ask whether the trial court abused its discretion by holding that Plaintiff's expert's opinion was inadmissible, and whether the Court of Appeals correctly applied the standard of review. *Cullum v Lopatin*, 497 Mich 1016; 862 NW2d 228 (2015). MAJ's answer to both of these questions is "Yes."

Appellate Courts review a trial court's determination regarding the qualifications of a proposed expert witness for an abuse of discretion. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). This Court likewise reviews for an abuse of discretion a trial court's decision whether to admit evidence. *Craig ex rel Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). An abuse of discretion occurs when the trial court chooses an outcome falling outside the principled range of outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006); *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). A court "would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell v Hartmarx Corp*, 496 US 384, 405; 110 S Ct 2447; 110 L Ed 2d 359 (1990).

It is MAJ's position that the trial court abused its discretion by determining that plaintiff's expert's opinion was based on speculation. In reaching its conclusion, the trial court impermissibly ignored a large portion of plaintiff's offered proofs, disregarded expert testimony, and made credibility determinations by favoring and relying on defense expert testimony. In sum, the trial court failed to consider all the evidence, a clear abuse of discretion when considering whether plaintiff's expert's opinions were based on the facts of the case. MAJ incorporates the factual analysis of the case set forth by Plaintiff-Appellee.

CONCLUSION

In sum, it is the position of the MAJ that a trial court does not need to consider MCL 600.2955 when evaluating the threshold admissibility of expert testimony under MRE 702 if the court is only evaluating whether the testimony is based on "sufficient facts and data" or whether the expert's methodology is "reliably applied to the facts of the case;" however, if the trial court conducts an inquiry into whether an expert's opinions are the "product of

reliable principles and methods," then the court has to concurrently analyze the §2955 factors, which specifically inform the inquiry. It is also MAJ's position that the trial court abused its discretion by determining that plaintiff's expert's opinion was based on speculation.

The Court of Appeals analysis of the issues is correct. Accordingly, Amicus Curiae MAJ respectfully requests that this Honorable Court deny leave to appeal.

Respectfully submitted,

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Dated: September 22, 2015

CERTIFICATE OF SERVICE

The undersigned certifies that on the 22nd day of September, 2015, she caused a copy of the Amicus Curiae Brief of the Michigan Association of Justice to be served upon all parties of record, and that such service was made electronically via this Court's TrueFiling electronic service system. Notice of this filing will be sent to the parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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